Supreme Court, U.S.
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No. 98-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON
PRESIDENT OF THE UNITED STATES, ET AL., PETITIONER

v.

JAMES T. GOLDSMITH, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. §§ 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. §§ 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C §§ 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 48 M.J. 84 (1998), is located at Pet. for Cert. 1a-19a. The order of the United States Air Force Court of Criminal Appeals is unreported. It is located at Pet. for Cert. App. 22a-24a. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction and sentence is unreported and is located at Pet. for Cert. 30a-38a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(4).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at Pet. for Cert. App. 39a-42a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted except where noted.

Respondent was convicted of various offenses based on two sexual relationships occurring in 1989 and 1993. At his court-martial, respondent faced a maximum punishment of a dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine. A dismissal would cause automatic forfeiture of Veterans Affairs (VA) benefits, such as medical care for his terminal HIV affliction. After considering the evidence and respondent's situation, the court-martial sentenced respondent on March 4, 1994 to only six years

confinement and to forfeit $2,500 pay per month for 72 months. No dismissal was adjudged.

On February 10, 1996, Congress enacted 10 U.S.C. §§ 1161(b)(2) and 1167, thereby creating a new means for the President to drop an officer from the rolls (DFR) of the Armed Forces, namely when an officer is sentenced by a court-martial to confinement for more than six months, with the sentence having become final and the member having served at least six months confinement.

On September 10, 1996, respondent was notified that he was considered but not selected for promotion to the grade of lieutenant colonel. He was also notified that he had been selected by the Major Selective Continuation Board to remain on active duty until he first became eligible to retire as an officer at 20 years of service. The Air Force informed respondent that he could accept or decline this continued active service option. If respondent declined continuation on active duty, he would receive an honorable discharge with separation pay, in addition to further benefits, such as transition assistance. On or about September 26, 1996, respondent elected to accept continuation on active duty, thus incurring a one-year active duty service commitment from the date the continuation period began.

Despite being continued on active duty, the respondent was notified on November 27, 1996 by the Air Force that it was initiating a DFR action pursuant to Section 563 of the National Defense Authorization Act of 1996 and AFI 36-3207, para 4.2.3.[1] The notification letter unequivocally

[1] The Air Force failed to amend AFI 36-3207 to provide for a DFR action against an officer serving a court-martial sentence to confinement for more than 6 months. This deficiency likewise renders infirm the November 27, 1996 DFR action against respondent.

states the DFR action would cost respondent his pay, his military status, and his VA benefits.

The pertinent VA regulation provides as follows: "[a] discharge or release because of one of the offenses specified in this paragraph is considered to have been under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." 38 C.F.R. § 3.12(d).

REASON FOR DENYING THE WRIT

The court-martial sentence imposed on respondent on March 4, 1994 did not include such permissible punishments as a separation with ignominy, total forfeitures of pay and allowances, and loss of Veterans Affairs (VA) Department benefits, including future VA medical care for his HIV infection. A statute that went into effect over two years later (and between 3 to 7 years after the commission of his offenses) sought to release certain military prisoners as a direct sanction for their court-martial convictions, by use of a DFR action. The DFR action imposed the exact punishments that respondent avoided in his general court-martial. VA regulations stigmatize prisoners who are released under a DFR action as separated under dishonorable conditions. 38 C.F.R. §§ 3.12(c)(2), (d)(3), (k)(3). The retroactive punishment imposed by the DFR action violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States. Using its expertise in military matters, the Court of Appeals for the Armed Forces had jurisdiction under the All Writs Act to bar the retroactive, multiple punishment in order to insure that only the adjudged and affirmed original sentence was carried out.

1. **The Court of Appeals for the Armed Forces properly took jurisdiction over respondent's challenge to**

the constitutionality of 10 U.S.C. §§ 1161(b) and 1167 when it invoked the All Writs Act (28 U.S.C. § 1651(a)) to grant extraordinary relief. As an Article I court created by Congress, the Court of Appeals for the Armed Forces properly exercised the power given it under the All Writs Act as necessary or appropriate in aid of its jurisdiction and to exercise powers implied from the creation of this Court. 28 U.S.C. § 1651(a); *Noyd v. Bond,* 395 U.S. 683, n. 7, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969); *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)(the then Court of Military Appeals [now Court of Appeals for the Armed Forces] noted it possesses powers incidental to and protective of those defined in Article 67, Uniform Code of Military Justice); *Dettinger v. United States,* 7 M.J. 216 (C.M.A. 1979). *See also Del Prado v. United States,* 23 U.S.C.M.A. 132, 48 C.M.R. 748 (1974)(Court of Military Appeals granted a writ of error *coram nobis* and declared accused's conviction null and void despite finality of accused's conviction, his sentence having being executed and a general discharge having been substituted for a punitive discharge even though a jurisdictional error had not been asserted or recognized when the conviction was initially reviewed and affirmed by the Court of Military Appeals); *In re Watson,* 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970)(Court of Military Appeals has jurisdiction over cases properly before it or which might come before it).

Though petitioner notes the *Noyd* Court's caution that a "different question would ... arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes", the *Noyd* Court referenced *United States v. Bevilacqua,* 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968) in its opinion. In *Bevilacqua,* the Court of Military Appeals held that it had jurisdiction to consider the petitioner's application for a writ of error *coram nobis* though petitioner's court-

martial conviction had been approved and executed by the convening authority. Furthermore, Bevilacqua's request for relief to the Air Force Board of Corrections of Military Records had twice been rejected before presenting his application of a writ of error *coram nobis.* The Court of Military Appeals concluded that it had the power to "accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary". *Bevilacqua,* at 12. This pronouncement was endorsed by this Honorable Court in *United States v. Augenblick,* 393 U.S. 348, 350, 89 S.Ct. 528, 530, 21 L.Ed.2d. 537 (1969); *Cf. Adams v. United States,* 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), *reh den,* 317 U.S. 713, 87 L.Ed. 568 (1943)(unless limited by Congress, a Federal court may avail itself of all auxiliary writs as aids in performance of its duties when use of such historic aids is calculated in its sound judgment to achieve ends of justice entrusted to it). Likewise, the authority of the Court of Appeals extends to those cases that are within its appellate jurisdiction although no appeal has been perfected. *Application of President & Directors of Georgetown College, Inc.,* 118 U.S. App. D.C. 80, 331 F.2d 1000, *reh den,* 118 U.S. App. D.C. 90, 331 F.2d 1010, *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

The Court of Appeals for the Armed Forces was granted broad discretion by Congress to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces. *Gale v. United States,* 17 U.S.C.M.A. 40, 37 C.M.R. 304, 306 (1967). In *Gale,* the Court of Military Appeals highlighted the intent of Congress to confer upon the Court of Military Appeals a general supervisory power over the administration of military justice when it enacted

10 U.S.C. § 867. The key role envisioned by Congress in enhancing the fairness of military justice was stated in a House Report as follows:

> Article 67 contains the most revolutionary changes which have ever been incorporated into our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice.

H. Rep. No. 491, 81st Cong., 1st Sess. 6 (1949).

Likewise, the importance of military justice oversight was stressed by Mr. Brooks during the full committee hearings on H. R. 4080. Mr. Brooks stated that

> "[t]he Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Full Committee Hearings on H. R. 3341 and H. R. 4080, 81st Cong., 1st Sess. 1328 (1949).

Thus, jurisdiction exists for the Court of Appeals to entertain respondent's petition as it directly relates to the administration of justice in the United States Armed Forces. Moreover, the Court of Appeals presents a single judicial forum for military members to assert their claims, *no matter the location of trial or confinement.* Since military members may be tried and incarcerated worldwide, Judge Sullivan correctly observed in his concurring opinion below that the

Court of Appeals for the Armed Forces should not wait for another court to perhaps act to protect the rights of all servicemembers in court-martial matters. Pet. for Cert. App. 17a.

Moreover, the exercise of jurisdiction by the Court of Appeals for the Armed Forces was proper in this case, as the court ruled upon the constitutionality of the action to drop respondent from the rolls of the Air Force as it affected and increased the punishment imposed by the decision of the court-martial. The Court of Appeals for the Armed Forces is uniquely qualified to determine the legality of actions affecting the sentence of a court-martial, as it concerns itself with the intricacies of the military justice system on a daily basis. As such, the general rule set forth by this Honorable Court that *habeas corpus* petitions from military prisoners should not be entertained by federal courts until all available remedies within the military court system have been exhausted validates the wisdom of Congress in investing the Court of Appeals for the Armed Forces with broad oversight over military justice matters. *Gusik v. Schilder,* 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950). In recognizing the need to provide for direct civilian review over military justice matters, Congress established the Court of Military Appeals "so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond, supra,* 395 U.S., at 695.

2. **The President's exercise of authority under 10 U.S.C. §§ 1161(b)(2) and 1167 in respondent's case will violate the *Ex Post Facto* and Double Jeopardy Clauses of the United States Constitution.**

This Honorable Court first discussed the *Ex Post Facto* Clause in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). Justice Chase held that the clause proscribed four

types of legislation, the third of which is relevant to respondent's situation: "Every law that changes the punishment, ***and inflicts a greater punishment,*** than the law annexed to the crime, when committed" (*Calder,* at 390, emphasis added). These became such well-settled principles that in *Beazell v. Ohio,* 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925), Mr. Justice Stone stated:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law at the time when the act was committed, is prohibited as ex post facto.

This Honorable Court has consistently adhered to the *Calder* doctrine for 200 years. See generally *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). In deciding whether a new law makes the punishment for a crime more burdensome, the approach of this Honorable Court has been to determine whether the new law is, in application, merely procedural, or substantively affects the punishment received for a given offense. Then Mr. Justice Rehnquist, delivering the opinion of the Court in *Dobbert v. Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), noted that:

> It is equally well settled, however, that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime was committed." *Gibson v. Mississippi,* 162 U.S. 565, 590, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896).

> "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina,* 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

This Honorable Court has consistently declined to establish any "formula" for determining which legislative acts will have a sufficient effect on substantive crimes or punishments to constitute an *ex post facto* violation. See *Beazell, supra,* 269 U.S., at 171, 46 S.Ct., at 69; *California Dept. of Corrections v. Morales,* 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Thus, in determining if certain legislative acts violate the *Ex Post Facto* Clause of the Constitution, courts have looked to whether the legislation affects matters of substance or is merely procedural. In his concurrence in *Calder,* Justice Iredell described *ex post facto* laws as flagrant instances of tyranny, but limited them to penal legislation, a requirement that still exists today for an *ex post facto* violation. *Calder,* at 399. However, the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Burgess v. Salmon,* 97 U.S. 381, 24 L.Ed. 1104 (1878). Instead, one must look to the effect of the legislation. *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87, 3 L.Ed. 162 (1810). The constitutional prohibition is addressed to laws "whatever their form" that alter the nature of the offense or increase the punishment. *Beazell,* 269 U.S., at 170.

The DFR legislation was penal and punitive, both in intent and effect. First, by its own terms, 10 U.S.C. § 1161(b) applies to respondent solely "by reason of a sentence to confinement adjudged by a court-martial." Since the triggering mechanism is a conviction, this Section 1161(b) is

clearly penal. Second, the petition for certiorari describes a DFR action as a "personnel" action. The description is misstated. A review of the history of past and present DFR legislation reveals that the current DFR legislation has been enacted *in pari materia* with military justice matters as a punitive sanction for criminal behavior that was not imposed in the military criminal proceeding.

Prior to 1996, the DFR legislation only applied to officers who were absent without authority for at least three months or who were sentenced to confinement in a federal or state penitentiary or correctional institution after being found guilty of an offense by a court **other than** a court-martial or other military court. Congress specifically exempted court-martialed officers from being subject to DFR actions. In 1996, Congress amended the prior DFR statute, 10 U.S.C. § 1161(b), well after respondent's conviction and appeal, through Pub. L. 104-106, § 563, 110 Stat. 186. The amendment was effective February 10, 1996 and stated that a commissioned officer could be now be administratively separated under Section 1178 of Title 10 by reason of a sentence to confinement adjudged by a court-martial.[2] The legislation then amended Section 1161(b) to permit the Armed Forces to summarily drop such an officer from the rolls.

The same National Defense Authorization Act for FY 1996 enacted *in pari materia* Sections 1121 and 1122, which respectively amended Article 57(a) and created the new Article 58b, of the Uniform Code of Military Justice (UCMJ), thus evidencing an intent to use DFR actions in a punitive

[2] However, Title 10 had no section 1178. Congress corrected this error in the National Defense Authorization Act for FY 1997 in a technical amendment found at Pub. L. No. 104-201, § 1074(a)(5), 110 Stat. 2422. This amendment reworded § 1161 to read "section 1167" instead of "section 1178" effective Sept. 23, 1996.

manner in military justice matters. Amended Article 57(a) changed the effective date of adjudged forfeitures of pay and allowances and/or reductions in grade to the date the court-martial convening authority took action or 14 days after sentence was adjudged, whichever occurred first. The new Article 58b directed forfeitures of pay and allowances at the jurisdictional maximum of the special or general court-martial, depending on the forum at hand, when a service member's confinement was for more than six months, for less than six months if a punitive discharge was adjudged, or if death were adjudged. As the legislative history of Articles 57(a) and Article 58b reveals, the changes to these Articles were made specifically to punish military offenders who, at the time of the legislation, could continue to receive their military pay while serving their sentences to confinement, under certain circumstances. When Senator Boxer first brought this idea to Congress, she noted not only the money the legislation would save, but that it would "treat military criminals as they deserve to be treated—as criminals—to be punished, not rewarded." (141 Cong. Rec. S 802.) The Court of Appeals for the Armed Forces found this legislation to have a punitive intent and thus violative of the *Ex Post Facto* Clause in *United States v. Gorski*, 47 M.J. 370 (1997), when applied to military members whose crimes occurred before the effective date of the legislation.[3]

Thus, at the same time that Congress was changing Article 57(a) and adding Article 58b to accomplish their goal of punishing future offenders through military pay provisions, it also changed the law to allow the dropping of officers from

[3] The National Defense Authorization Act for FY 1996 applied amended Article 57(a) and new Article 58b to court-martial sentences adjudged "on or after the first day of the first month that begins at least 30 days after the date of the enactment of this Act." Thus, the effective date was April 1, 1996.

the rolls after their prior court-martial convictions. This ensured that officer prisoners in confinement at the time of the legislation would be subject to comparable punishments as those imposed by Article 57(a) and Article 58b on future offenders. This fact was noted by the Court of Appeals for the Armed Forces when it stated "[i]ndeed, termination of an officer's military status by dropping from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b." Pet. for Cert. 14a. By enacting these three provisions *in pari materia,* Congress sought to impose punishments on officers in respondent's situation beyond the adjudged court-martial sentence. Mislabeling the DFR action as a personnel action is deliberately misleading. The DFR action is a direct criminal sanction to impose punishment that the court-martial chose affirmatively not to adjudge as a part of respondent's sentence: a discharge with ignominy[4], loss of all pay and allowances, and loss of VA benefits, including VA medical care for this HIV-infected service member[5].

It was precisely this Congressional climate, the interlocking legislative history, and effect of the DFR action that caused the Court of Appeals for the Armed Forces to conclude that the DFR legislation "can be viewed as part of a package designed to deal with the same congressional concern that motivated passage of the 'punitive' Article 58b."

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[4] It is important to note that a dismissal is considered the most severe punishment an officer accused can receive at a court-martial, short of a death sentence.

[5] By choosing to serve the DFR action after the respondent had elected to continue on active duty, the Air Force was able to eliminate respondent's opportunity to receive an involuntary separation under AFI 36-3207, with its corresponding separation pay, honorable discharge and other benefits.

Goldsmith v. Clinton, 48 M.J. 84, 90 (1998). Thus, the DFR legislation has a punitive intent and a punitive effect.

As support for its argument that the new DFR legislation is an administrative personnel action, the petitioner relies on *Helmich v. Nibert,* 543 F. Supp. 725 (D. Md. 1982) by citing the court's conclusion that a DFR action is a non-disciplinary administrative action. However, several key factors undercut the foundation of this conclusion. This action was brought by a *pro se* litigant who was serving out a 12-year sentence to confinement after his federal conviction for offenses stemming from planting a bomb at the Hartsfield Atlanta International Airport. At all relevant times to the proceedings, Helmich was a member of the Army Reserve. After notification of the federal sentence, the Reserve dropped Helmich from its rolls pursuant to the Army Rule 135-75, § 3-b, the enacting regulation for the pre-1996 DFR legislation. Helmich brought his action in federal district court alleging a violation of due process under the Fifth Amendment for having been dropped from the rolls without a discharge board hearing. The court then dismissed Helmich's complaint as failing to state a claim. *Helmich,* at 727. However, the court's opinion is fatally flawed as it did not consider the relevant VA regulation, which unequivocally states that "[a] discharge or release because of one of the offenses specified in this paragraph is considered to have been under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." 38 C.F.R. § 3.12(d) (emphasis added). Despite its ultimate holding, the court properly acknowledged that a liberty interest, which is protected by the Fifth Amendment's Due Process Clause, is at hand when the military separates a member under conditions that stigmatize that member, "typically by *dishonorable* discharge." *Helmich,* at 727. (citation omitted). However, the *Helmich* court then erred in

its conclusion because the relevant VA regulation **did** impose a stigma akin to a dishonorable discharge upon a military member dropped from the rolls. Additionally, the member is denied payment of pension, compensation, or dependency and indemnity benefits. 38 U.S.C. § 101(2) and 38 C.F.R. § 3.12(a). The court's failure to consider, much less acknowledge, the VA regulation completely undermines its conclusion that Helmich's DFR action was merely administrative in nature. As such, this Honorable Court should reject petitioner's argument concerning the *Helmich* case.

Turning next to the Double Jeopardy issue, the Court of Appeals noted that this Honorable Court has interpreted this Clause to prohibit "the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.'" Pet. for Cert. 13a, citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085, 138 L.Ed.2d 501 (1997), quoting *Witte v. United States*, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995). A second punishment was imposed on respondent by Congress after he had already been tried and sentenced. The Court below reached the correct conclusion that this legislation was punitive; thus, it violated the Double Jeopardy Clause as applied to respondent.

3. **Deference to the military tribunal is particularly important in this context as the Court of Appeals for the Armed Forces was called upon to determine the constitutionality of the DFR action against respondent.** As remarked upon by this Honorable Court in *Noyd v. Bond*, 395 U.S., at 694, a substantial degree of deference must be accorded to military tribunals. Indeed, the Court of Appeals for the Armed Forces is uniquely qualified to consider the special requirements and concerns of the Armed Forces, a task it has been doing for over 47 years. The Court was specifically created to safeguard the rights of servicemembers.

In creating the UCMJ and the present appellate structure in 1950, Congress increased oversight of the military justice system. As Congressman Philbin from Massachusetts noted about the Court of Military Appeals (now named the Court of Appeals for the Armed Forces) during the Congressional Floor Debate on the UCMJ:

> [I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

Cong. Floor Debate on UCMJ, U.S. House of Representatives, Cong. Record, Vol 95, Pt 5, p. 5718 (1949). Because of this unique charter, this Honorable Court should give great deference to the Court of Appeals' determination that it properly exercised jurisdiction as the issues before it concerned the constitutionality of a retroactive application of a statute increasing respondent's court-martial sentence. *See Middendorf v. Henry*, 425 U.S. 25, 43, 96 S.Ct. 1281, 1292, 47 L.Ed.2d 556 (1976)(dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference).

CONCLUSION

The opinion and judgment of the Court of Appeals for the Armed Forces must stand as the court below properly exercised its jurisdiction under the All Writs Act to prohibit the application of statutes violative of both the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution of the United States.

WHEREFORE, this Honorable Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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